Violation of Automatic Stay
11 USC § 362(h)

Davids v. State of Oregon, Adversary No. 03-6245-fra
Colin and Victoria Davids, Case No. 602-64380-fra13

10/28/2003 FRA Unpublished

Debtors owed a debt to the Oregon Department of Human Services (DHS) in the amount of $654 and scheduled the debt in their Chapter 13 bankruptcy case as nonpriority unsecured. When the Trustee made payments to DHS pursuant to Debtors' plan of reorganization, a statement was automatically generated and sent to the Debtors which verified that the payment had been credited to the account, provided the account balance, and stated when the next payment was due. In an affidavit, DHS stated that since its computer system does not allow for the substitution of the trustee for the debtors, it is its policy when an account holder files bankruptcy to enter a notation so that no statement is mailed when a payment is made. Through an oversight, however, this was not done. Debtors filed an action under § 362(h) for damages relating to DHS's alleged violation of the automatic stay, seeking actual damages and damages relating to emotional distress.

In response to DHS's motion for summary judgment, the court held that the mailing of the statement by DHS did not constitute a violation of the automatic stay. The court found that there was nothing about the statements which could be construed as coercive, threatening, or demanding, which the Ninth Circuit has held is a requirement for a violation of the automatic stay. The statements themselves were more in the nature of informational. As the Plaintiffs had no grounds other than the mailing of the statements for asserting a violation of the stay, judgment was awarded to the Defendant.

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In Re: COLIN C. DAVIDS and VICTORIA L. DAVIDS, Debtors.	)	Bankr. Case No. 602-64380-fra13
COLIN C. DAVIDS and VICTORIA L. DAVIDS, Plaintiffs, v. STATE OF OREGON, Department of Human Services, Overpayment Recovery Unit, Defendant.	)	Adv. Proc. No. 03-6245-fra MEMORANDUM OPINION

Plaintiffs filed an adversary proceeding seeking damages from an agency of the State of Oregon for willful violation of the automatic stay. 11 U.S.C. § 362(h). The State has filed a motion for summary judgment. Fed R. Bankr. P. 7056. After reviewing the record and considering the arguments of the parties, I conclude that the material facts are undisputed, and that the State is entitled to prevail as a matter of law.

I. FACTS

Plaintiffs are the debtors in an underlying Chapter 13 case filed on June 12, 2002.[1] An order confirming the plan (Doc. # 7) was entered on August 29, 2002. The order provides that creditors are to receive payment of 100% of their claims.

The State of Oregon, acting through the Department of Human Services, filed a proof of claim (#1) on June 20, 2002, in the amount of $654.00. The account described in the claim was in the name of Victoria Davids, although an attached report identified Colin Davids as an "other liable adult." Priority treatment was not sought.

After the plan was confirmed, the Trustee began to make *pro rata* monthly payments to creditors with allowed claims, including the State. Upon receipt of each payment from the Trustee, the State followed its standard procedure by issuing a document entitled "Overpayment Statement of Account" which acknowledged receipt of the payment and that it had been credited to the Plaintiffs' account. The statement went on to say that "Your next payment is due [four weeks later]. Please detach the form below and return with your payment in the enclosed envelope, to ensure proper credit to your account." A copy of one of the statements is set out in the appendix to this opinion, with Social Security and account numbers redacted.

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[1]The Court takes judicial notice of the papers filed in the Chapter 13 case. Fed.R.Evid. 201.

The statements were mailed to the Debtors. In its supporting affidavit, the State notes that its "somewhat cumbersome" computer system did not permit substitution of the Trustee for the Debtors. There is, however, a field ordinarily used in bankruptcy cases which prevents any statement from being issued. In this case, state personnel failed to enter the bankruptcy notation. As a result of the oversight, the statements were generated and mailed after each payment as if the bankruptcy case had not been commenced.

Plaintiffs allege that the issuance and delivery of the statements constitutes a willful violation of the automatic stay, and seek damages for actual economic loss, and emotional distress. [2]

II. DISCUSSION

A. Summary Judgment

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56, made applicable by Fed. R. Bankr. P. 7056. The movant has the burden of establishing that there is no genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The primary inquiry is whether the evidence presents a sufficient disagreement to require a trial, or whether it is so one-sided that

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[2] Plaintiffs conceded at oral argument that their claim for punitive damages was not supported by the facts of this case.

one party must prevail as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986).

A party opposing a properly supported motion for summary judgment must present affirmative evidence of a disputed material fact from which a factfinder might return a verdict in its favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986). Bankruptcy Rule 7056, which incorporates Federal Rule of Civil Procedure 56(e), provides that the nonmoving party may not rest upon mere allegations or denials in the pleadings, but must respond with specific facts showing there is a genuine issue of material fact for trial. Absent such response, summary judgment shall be granted if appropriate. See Celotex Corp. v. Catrett, 477 U.S. 317, 326-27 (1986).

B. Automatic Stay

Code § 362(a) provides:

> Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of -
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> * * *
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> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

The purpose of this provision is to allow breathing room to a debtor seeking to reorganize, and to enable bankruptcy courts to oversee the process. While the language of §362(a)(6) seems absolute, it is well established that the Code does not operate to

deny creditors the opportunity to make their claims known, or to take noncoercive action to preserve their rights. *See, e.g.,* Morgan Guaranty Trust Company of New York v. American Savings and Loan Association 804 F.2d 1487 (9th Cir. 1986) (presentment of notes not barred by automatic stay); Brown v. Pennsylvania State Employees Credit Union, 851 F. 2d 81 (3d Cir. 1988) (Letter from Credit Union advising of its policies re: members who file bankruptcy petitions); LTV Corporation v. Gulf States Steel, Inc. Of Alabama, 969 F. 2d 1050 (Notice of breach to indemnitor); In re Sixteen to One Mining Corp., 9 B.R. 636 (Bankr. D. Nev. 1981) (Notice of breach of lease, without attempt to recover property); Sears, Roebuck & Co. V. Duke, 1995 WL 15172 (N. D. Ill 1995) and cases collected therein (written communication offering to enter into reaffirmation agreement).

In Morgan the Court of Appeals considered the whole of §362, and noted that

> the activities that are specifically prohibited all involve attempts to confiscate the debtor's property or require the debtor to act affirmatively to protect its interests. Presentment and other requests for payment unaccompanied by coercion or harassment do not appear to fall within the prohibitions of section 362(a).

Morgan Guaranty Trust Company of New York v. American Savings and Loan Association, 804 F.2d at 1490.

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In this case, the only acts complained of are the delivery to Victoria Davids of three statements.[3] Plaintiffs did not file any affidavits supporting their position, and their Statement of Material Facts does not take issue with any matter asserted by the Defendant. There is no extrinsic evidence of any harassment or coercion. Instead, Plaintiffs argue that the statement is inherently coercive.

The statements themselves have three functions: (1) to acknowledge receipt of a payment; (2) to inform of the remaining balance; and (3) to provide for future payment in a manner that ensures proper credit to the account. Had they been mailed to the Trustee, they would have been entirely unremarkable. The effect of delivery of the statements to the Debtors is simply to advise them that a portion of their Chapter 13 plan payments are being sent by the Trustee to the State as their plan requires, and that they are receiving due credit for payment. The part of the statement suggesting further payment is not a demand so much as an instruction to be used in the event a payment is volunteered. There is nothing about the statements which can reasonably be construed as coercive, threatening, or demanding. There is no attempt to seize assets from

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[3]It was revealed at oral argument that the State's computers , like the sorcerer's apprentice's brooms, are continuing their work, and that statements are still being mailed to the plaintiffs. It is worth noting that the outcome of this case is based on the content of the communication, and not the state's inability to control its electronic servants. *See* In re Campion, 294 B.R. 313 (BAP 9th Cir. 2003) ("We perceive no difference as a practical matter between a computer program that does not perform tasks accurately and a clerical employee who does not perform tasks accurately.")

the Debtors or the estate, or to force the Debtors to take any action. All that the statements do is confirm that actions already taken voluntarily by the Debtors continue to be effective.

Plaintiffs have the burden of proving that the delivery of the statements was a violation of the automatic stay. TransSouth Fin. Corp. v. Sharon (In re Sharon), 234 B.R. 676, 687 (BAP 6th Cir. 1999)(When damages are sought under § 362(h) for violation of the automatic stay, the party seeking damages bears the burden of proof). The record now before the court is uncontested, and does not meet that burden. At worst, the delivery of the statements is no more than "a request for payment unaccompanied by coercion or harassment." More likely, it is not even an "act to collect, assess or recover a claim," but an acknowledgment of the Debtors' voluntary payment through the plan. I find, as a matter of law, that issuance and delivery of the account statements was not prohibited by §362, and that the State is entitled to judgment in its favor. In light of the foregoing, I express no opinion with respect to the nature or amount of damages sought by Debtors.

The foregoing constitutes the Court's findings of fact and conclusions of law. Counsel for the State shall lodge a form of judgment consistent with this opinion, awarding costs to the State.

FRANK R. ALLEY, III
Bankruptcy Judge